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October Term, 1969
No. 69-

DANIEL ROWAN, d.b.a. AMERICAN BOOK SERVICE, et al.,

Appellants,

vs.

UNITED STATES POST OFFICE DEPARTMENT, et al.,

On Appeal From the United States District Court for the Central District of California

OPPOSITION TO MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

October Term, 1969
No. 399

DANIEL ROWAN, D.B.A. AMERICAN BOOK SERVICE, *et al.*,

Appellants,

vs.

UNITED STATES POST OFFICE DEPARTMENT, *et al.*,

On Appeal From the United States District Court for the Central District of California.

OPPOSITION TO MOTION TO AFFIRM.

Statement.

Respondents have filed a Motion to Affirm a judgment of a Three-Judge District Court. Said District Court was convened pursuant to 28 U.S.C. 2284 and a direct appeal was lodged under 28 U.S.C. 1253.

To reiterate the facts would be unduly oppressive in its repetition. Appellants therefore proceed to argument in opposition to the Motion to Affirm.

ARGUMENT.

The questions raised by appellants require plenary consideration by this Court. It would be sufficient to note the opinion of the concurring judge in the District Court opinion appealed from herein wherein she states, "The First Amendment challenge to Section 4009 presents delicate constitutional problems. The statute is a novel combination of private and state action designed to limit the sending of a particular kind of advertising through the mails. No more convincing argument need be made to inspire the invocation of this Court's jurisdiction over the questions presented by this appeal.

The rights involved are those fundamental rights inherent in and critical to this society. The attempted intrusion and erosion of those rights occur by way of a sweeping novel and new approach. Therein is a sufficient cry for plenary consideration by this Court.

> "The United States may give up the Post Office when it sees fit, but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues. . ."
>
> *Milwaukee Publishing Co., v. Burleson*, 255 U.S. 407, 437.

The legal truth of that pronouncement by Justice Holmes by itself should place the issues and questions herein before this Court for consideration. However, in addition the following reasons are offered.

1. The decision of the District Court which is appealed herein stands directly in conflict with the decision of a Federal District Court in another part of our country. The majority opinion in this matter pre-

sented herein seemed to base its justification of constitutionality upon the concept of privacy. However, in the case of *Lamont v. Commissioner of Motor Vehicles,* 269 F. Supp. 80, the Court stated:

> ". . . The mailbox, however noxious its advertising contents, often seem to Judges, as well as other people, is hardly the kind of enclave that requires Constitutional defense to protect 'the privacies of life'. In short, the regular journey from mailbox to trash can—the contents of which the State chooses to pay the freight when it facilitates the distribution of trash—is an acceptable burden, at least so far as the Constitution is concerned. The bells at the door and on the telephone, through their ring, is a more imperious nuisance than the mailman's tidings, accomplish more peripheral assaults than the blur of an inescapable radio."

That court further stated:

> "In his contrary thesis, plaintiff proposes to stretch the Constitutional dimensions of 'privacy' far beyond any reasonably foreseeable limits the Courts ought to enforce. . . ".

The conflict presented by the views of two Federal Courts warrants the consideration of this Court so that resolution of such fundamental questions be made clear and known.

2. The majority opinion set forth as Appendix "A" to Appellants Jurisdictional Statement approaches the problem as if two private individuals were involved, one with the other and as if governmental participation, intrusion, enforcement, or implementation were not present. The view taken therein therefore leads to the

conclusion that the purported right of privacy entitles itself to a more preferred position than the Appellants' right to use the mail which is embodied within the First Amendment of the Constitution.

This approach does not take cognizance that 39 U.S.C. 4009 provides in paragraph (c) that in addition to the order directing the appellants to refrain from further mailing that the Postmaster General shall expressly prohibit the sender (Appellants herein) and his agents or assigns from making any further mailings to the addressee and that further the Postmaster General shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, to prohibit the sender and his agents or assigns from the sale, rental, exchange or other transactions involving the mailing lists bearing the names of such a designated addressee.

In subsection (d) of said statute, it is the Postmaster General who determines if any order has been violated and who is given authority once he so determines, to request the Attorney General to make application to a District Court of the United States for an order directing compliance with such a notice or order. Further violation of such procured order could lead to contempt of court.

To argue that these powers are merely ancillary to a purported right of privacy and are in no way governmental intrusions or encroachments upon First Amendment rights would be to hurl our judicial system back before the time of *Shelly v. Kramer,* 334 U.S. 1, and into the era of the fictions which upheld

Constitutional erosions and intrusions in the name of nongovernmental activity. The issue is clear. If this is governmental activity, can the Congress of the United States grant the powers it has so attempted to do and in the manner it has to intrude upon free speech and press? If this is truly private individual action with no significant governmental participation, by what criteria and indicia is it ascertained which is the greater right under the First Amendment?

Indeed, if the Postmaster General were lodged with the initial power to determine what is erotically arousing or sexually provocative (within his sole discretion) as same may flow through the mails, and if the Postmaster General could thereafter order the refraining of the use of mails predicated upon this determination, plenary consideration of that issue would be warranted. Can it be said therefore that the granting of the same power to private individuals has now insulated the exercise of power so that this Court can find no true justification to review the statute?

The question has been answered by this Court and other courts of this land on many occasions. *Speiser v. Randall,* 357 U.S. 513, 518; *Manuel Enterprises v. Day,* 370 U.S. 478, 504; *Near v. Minnesota,* 284 U.S. 697; *Summerfield v. Sunshine Book Company,* 95 U.S. App. D.C. 169, 221 F. 2d 42; *Walker v. Popenoe,* 149 F. 2d 511.

3. The Specially Concurring Memorandum Opinion in this matter which is attached to Appellants' Jurisdictional Statement as Appendix "B" gives further support to the necessity that this matter be reviewed and determined by this Court. Circuit Judge Hufstedler

in the Specially Concurring Memorandum Opinion states:

> ". . . *In my view the statute can be salvaged by meticulously construing its provisions to shrink its loosely woven fabric to Constitutional size and by applying to the statute, as thus construed, settled Constitutional doctrine. It cannot be saved by submerging the First Amendment problems, as does the majority opinion, by invoking an amorphous concept of the right of privacy.*" (Emphasis added).

The Judge then proceeds to shrink the statute because if applied as intended by Congress and as urged by the Attorney General of the United States[1] the Constitutional rights as provided in the First and Fifth Amendments of the Constitution of the United States become smothered by the blanket approach and attempt of 39 U.S.C. Section 4009.

Both Court and the moving party attempt to elevate their arguments and position for affirmation by speaking in terms of Congress' attempt to handle the sending of obscene material through the mails. Congress enacted legislation to handle the dissemination of obscene material through the mails[2] many years ago.

39 U.S.C. 4009 deals with material that is less than obscene. It deals with materials of advertising content that are in the sole discretion of recipient sexually provocative and erotically arousing. Pages 2 and 3 of Respondents' Motion to Affirm speaks of "pandering ad-

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[1]Reporters Transcript of Proceedings Partial page 6, line 25 through page 8, line 13.

[2]18 U.S.C. 1462, 39 U.S.C. 4006, 4007.

vertisements of obscene materials." Appellants respectfully submit that if Congress had intended to prohibit obscene material by its legislation, it would have used that language. It is clear that Congress has selected a broader field upon which to impose rampant censorship. Respondent's misstatements lends no dignity to the argument.

There are those in our society who find the tale of Adam and Eve erotically arousing or sexually provocative. There are those who find their monthly statements from the department stores which often times carry photographs of female and male models in various states of reasonable attire sexually provocative and erotically arousing. The list could continue at great length. The tragically frightening point, however, is that when such a determination is made and once this statute is invoked, a process is put in motion that ultimately leads to the reality of a contempt citation issued from a Court of the United States.

Further it is imperative to recall the following:

(a) The unfettered, and completely discretionary determination by an addressee starts the process; and

(b) The Government's position, as well as the language of the statute prohibits any type of mailing to a complaining recipient of any type of material; and

(c) The duty of the Postmaster General to prohibit the transacting and dealing with lists containing the name of such an initiating addressee; and

(d) The question of who shall determine whether a subsequent mailing is of similar matter (if respondent's position is adopted)[3] and,

(e) Why may not a mailer transact with a list containing the name of a complaining addressee if in fact it is permissible as Respondent contends, for the mailer to send non-offensive material through the mail; and

(f) Why does the United States Post Office conduct the hearings provided for in 39 U.S.C. 4009; and

(g) Why does the United States Post Office act as both prosecutor and judicial officer at such hearing; and

(h) Why may Appellants not cross examine complaining addressees.

Not only do the issues raised by this appeal as set forth in Appellants' Jurisdictional Statement warrant consideration but inherent in those issues are the foregoing questions and much more. The issues cannot be summarily dismissed by "shrinking the loosely woven fabric of this statute". Whether the fabric of the statute is shrunk or not, it remains so large as to completely envelope the First and Fifth Amendments of the Constitution of the United States.

Appended hereto is a newspaper article as disseminated by United Press International and published in the Los Angeles Times September 12, 1969. The incongruities and inconsistencies as well as the constitutional imperatives of this statute are probably more

[3]Respondents' Motion to Affirm, page 9.

graphically depicted in that article than in this document in opposition to the Motion to Affirm.

4. Respondents would seek affirmation of the judgment herein on the grounds that Appellants merely seek redress in this action because of the purported excessive cost in attempting to comply with 39 U.S.C. 4009. Summarily, let it be noted that the cost factor raised in the case below and as mentioned in the jurisdictional statement was only to indicate additional reasons for the necessity of injunctive relief. Appellants believe that this is obvious and no further comment is necessary.

5. Appendix to Appellants' Jurisdictional Statement as Appendix "C", are the Rules of Practice in proceedings relative to violations under 39 U.S. Code 4009. They are designated as 39 C.F.R. Part 956. A reading of these rules once again makes plenary consideration of the issues involved in this appeal necessary.

6. Respondents attempt to gain comfort from the case of *Boutilier v. Immigration and Naturalization Service,* 87 S. Ct. 1563, 387 U.S. 120; 387 U.S. 118. Respondents urge that the statute is not vague nor that it is an unlawful delegation of powers.

The lack of standards causes the statute here in question to fail when tested against the Constitutional safeguards provided to persons in this free society. It is clear that Congressional enactments which are vague and standardless, are repugnant to the Constitution and have consistently been struck down. *Winters v. New York,* 333 U.S. 507; *Giacco v. Pennsylvania,* 382 U.S. 399; *Arizona v. California,* 373 U.S. .... 625, 626.

In conjunction with the vagueness of this statute and its lack of standard is the attempted unlawful dele-

gation of power, 39 U.S.C. 4009 purports to repose in the addressee all the powers of the three branches of this Federal Government.

The words of Justice Cardozo in his concurring opinion in *Schecter Poultry Corp. v. United States*, 295 U.S. 495, wherein describing the NRA Code he said of the statute it was, "A delegation running riot" applies with equal vigor here.

In the case of *Arizona v. California*, 373 U.S. ..... 626; Justice Harlan announced:

> ". . . The principle that authority granted by the legislature must be limited by adequate standards serves two primary functions vital to preserving the separation of powers required by the Constitution. First, it inures that the fundamental policy decisions in our society will be made not by an appointed official, but by the body immediately responsible to the people. *Second*, it prevents judicial review from becoming merely an exercise at large by providing the Courts with some measure against which to judge the official action which has been challenged."

39 U.S.C. 4009 grants broad discretionary powers to private individuals. Its language is such that one cannot determine whether further mailings are any mailings or similar mailings. It cannot be ascertained who will determine or decide what is a similar mailing. Indeed it is not clear whether advertisements for sacks of potatoes may be prohibited. The statute is so broad and so standardless that Respondents themselves are in disagreement with the Court's interpretation of the statute.

If this were but the single issue raised by this appeal, plenary consideration would be warranted.

7. Asserting that Appellants' activities are commercial in nature gives no basis for affirmation of the judgment of the Court below. This Court has, on numerous occasions, spoken to the question. *Hannegan v. Esquire, Inc.*, 327 U.S. 146. Furthermore, if indeed the doctrine of *Valentine v. Chrestensen,* 316 U.S. 52 is applicable as contended by Respondent, it should be enunciated by this Court within the context of this delicate situation. No higher position is being sought for commercial activity by Appellant, nor is it contended that expression, commercial or otherwise is necessarily free from all restraint. What is being questioned here is whether 39 U.S.C. 4009 in attempting to regulate the free flow of materials, ideas and advertising has been done via the statute in a constitutional manner. This is an issue warranting consideration by this Court.

8. The cases of *Breard v. Alexandria,* 341 U.S. 622, and *Ginzburg v. United States,* 382 U.S. 463, as well as most of the other cases cited by Respondent were scrutinized and argued by Appellant in the Court below and are contained in the certified transcript presented to this Court under the cover of the Memorandum in Support of Plaintiffs' (Appellants herein) Motion for Preliminary Injunction. Further, many of the cases were also considered. The case of *Lamont v. Commissioner of Motor Vehicles,* 269 F. Supp. 880 by Judge Frankel and do not warrant any further discussion at this juncture.

Conclusion.

For the foregoing reasons, the Motion to Affirm should be dismissed and the issues raised on the appeal be considered by this Court.

Respectfully submitted,

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APPENDIX "A."

Man Halts All His Junk Mail Is Obscene

ANN ARBOR, Mich. (UPI) — If an advertisement for a sack of potatoes looks obscene to you, then it's obscene. And you can stop the mailman from leaving it at your door.

Obscenity, according to law, rests squarely in the eyes of the beholder.

Using that principle as his weapon, an Ann Arbor man has found the way to stop the flow of junk mail to his mail box.

Tired of the barrage of advertising circulars, Roger Staples complained that the food and department store advertising he received was obscene.

He sent the stuff back to his post office and demanded that no more of it ever darken his doorstep again.

Returns Mail

Richard Schneeberger, assistant postmaster at Ann Arbor, returned the mail to Staples. "The department store and food ads for which you signed cannot be considered as pandering in nature," he wrote.

Not so, Staples said.

"I consider the advertisements for beds, sheets, pillows, girdles, intimate feminine articles and other such materials offensive.

"A picture of a lingerie model in a provocative pose is just as obscene as anything I ever saw from so-called panderers."

He said the law makes the recipient sole judge of the obscenity of an advertisement and demanded the junk mail be stopped. He sent copies of his letter to Schneeberger, to his congressman and senators.

Sen. Phillip A. Hart (D-Mich.) sent the complaint on to the Post Office Department.

Its general counsel, David A. Nelson, delivered the judgment.

"Mr. Staples is correct in the assertion that his determination of the erotically arousing or sexually provocative nature of an advertisement may not be questioned," Nelson said.

Wilber F. Lawrence, assistant general counsel, summed it all up.

"Most people gripe about junk mail but don't do anything about it," he said. "But under the law, they can declare that an ad for a sack of potatoes looks sexy to them. And if they do, we're obliged to act."